ARKANSAS SUPREME COURT

No. CR 06-154

NOT DESIGNATED FOR PUBLICATION

ONIS M. KELLEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 27, 2006

PRO SE PETITION FOR WRIT OF CERTIORARI AND *PRO SE* MOTION FOR EXTENSION OF TIME TO FILE BRIEF [APPEAL FROM THE CIRCUIT COURT OF ASHLEY COUNTY, CR 99-169-1, HON. SAM POPE, JUDGE]

APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI AND MOTION FOR EXTENSION OF TIME MOOT

PER CURIAM

A jury found appellant Onis M. Kelley guilty of rape and sentenced him to 120 months' imprisonment. Appellant appealed the conviction and the Arkansas Court of Appeals affirmed. *Kelley v. State*, CACR 00-1036 (Ark. App. June 6, 2001). In 2003, appellant filed in the trial court a *pro se* petition requesting scientific testing under Act 1780 of the 2001 Acts of Arkansas, codified as Ark. Code Ann. § 16-112-201–16-112-207 (Repl. 2006). The petition was denied on a jurisdictional issue, and this court reversed and remanded. *Kelley v. State*, CR 04-233 (Ark. June 16, 2005) (*per curiam*). On remand, the trial court again denied the petition, ruling that the petition did not establish grounds for relief under Act 1780. Acting *pro se*, appellant has lodged an appeal of that order in this court, and now before us are his *pro se* petition for writ of certiorari and *pro se* motion for extension of time to file appellant's brief.

Appellant's petition for writ of *certiorari* points out that his petition for relief under Act 1780 was not included in the record. Ordinarily, we would grant the writ because the petition for Act 1780 relief is relevant to the appeal. However, that petition is contained in the record from appellant's previous appeal in this matter, and as a public record filed with this court, that record need not be incorporated to form a part of the record before us. As with the record from appellant's direct

appeal, this court takes notice of the record in appellant's first appeal of the denial of relief under Act 1780. *See Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997) (*per curiam*).

Based on those records before us, however, it is clear to us that appellant cannot prevail. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant cannot prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (*per curiam*); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (*per curiam*).

Act 1780 provides that a writ of *habeas corpus* can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. *See* Ark. Code Ann. § 16-112-103(a)(1) (Supp. 2003), and §§ 16-112-201--207 (Supp. 2003); *see also Echols v. State*, 350 Ark. 42, 44, 84 S.W.3d 424, 426 (2002) (*per curiam*). Under the act in effect when appellant filed his petition, a number of predicate requirements must be met before a circuit court can order that testing be done. *See* Ark. Code Ann. §§ 16-112-201 to -203 (Supp. 2003).

Arkansas Code Annotated § 16-112-202 (Supp. 2003) provides that "a person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if: (A) The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and (B) The evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial." Further, a petitioner seeking testing under Act 1780 must first present a *prima facie* case that identity was an issue at trial and the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect. Ark. Code Ann. § 16-112-202(c) (Supp. 2003). *See also, Graham v. State*, 358 Ark. 296, ___ S.W.3d ___ (2004) (*per curiam*).

It is clear from the record that identity was not an issue at trial, and appellant failed to make a *prima facie* case for relief under Act 1780. At trial, the victim testified that she had gone to a nightclub in Louisiana with a group of people that included appellant. The group was traveling in two separate cars, and during the drive back, after some individuals changed to a different car, the victim was alone in the car driven by appellant. Appellant turned the car onto a different route than the car they had been following, and stopped the car on a gravel road where the victim testified the rape took place. At trial, appellant did not contest the victim's story as to appellant's presence in the group and that he was eventually alone in the car with the victim, or that they stopped on the gravel road. His defense was that no intercourse occurred as the victim had testified. Appellant did not contest identity as an issue, therefore his petition did not present a claim under which relief could be granted pursuant to Act 1780.

As appellant did not establish a *prima facie* case under the Act, he cannot prevail. Accordingly, we dismiss the appeal. Appellant's petition for writ of *certiorari* and motion are therefore moot.

Appeal dismissed; petition for writ of *certiorari* and motion for extension of time moot.